
Two for the T, Three for You and Me: The MBTA's Exception to the Three-Year Statute of Limitations

“The ability to move people and goods, swiftly, safely and conveniently, determines, to a large extent, the economic well-being of our Commonwealth. In order to grow and prosper . . . in order to attract new industry and new jobs . . . we must provide a transportation system that adequately meets the needs of a modern industrial society. . . .

. . . .
*. . . We have worked at length to assure protection for all interests: the taxpayer, the commuter, the private transportation companies, and above all, the public interest. This is a program for all Massachusetts. The residents of Chicopee have as much to gain as the citizens of Cambridge. And the citizens of both have everything to lose if we do not act now to meet our Commonwealth's transportation crisis.”*¹

I. INTRODUCTION

During the evening rush hour on March 25, 2008, a CSX-owned, lumber-laden freight car came loose from Cohenno, Inc.'s yard, rolled three miles down the tracks, and collided with a southbound Massachusetts Bay Transportation Authority (MBTA) commuter train north of Canton Junction, Massachusetts.² Approximately one hundred fifty passengers on the train sustained injuries in the crash, and though not one injury was life-threatening, many injuries affected passengers' necks and backs.³ Under current Massachusetts law, any of those passengers would have three years to sue CSX or Cohenno, Inc. for their personal injuries.⁴ When bringing lawsuits against the MBTA, however, the injured passengers would have two years, not three.⁵

1. Message of His Excellency, Governor Endicott Peabody, Delivered in a Joint Convention of the Two Houses, Relative to the Transportation Problems in the Commonwealth, S. 153-820, 2d Sess., at 3, 15 (Mass. 1964) [hereinafter Message] (describing purpose of and need for new public transportation authority).

2. Milton Valencia & James Vaznis, *Freight Car Rams Commuter Train, Injuring 150*, BOSTON GLOBE, Mar. 26, 2008, at 1B (reporting collision, resulting injuries, and preliminary investigation).

3. *Id.*

4. MASS. GEN. LAWS ch. 260, § 2A (2006) (establishing three-year limitation on tort actions for personal injury and property damage). If a passenger had died in the crash, the estate would also have three years to sue. *Id.* § 10 (requiring estate sue within same period available to victim).

5. MASS. GEN. LAWS ch. 161A, § 38 (2006) (requiring plaintiff commence such suit within two years); see *Thomas v. Mass. Bay Transp. Auth.*, 450 N.E.2d 600, 602 (Mass. 1983) (affirming dismissal of action commenced against MBTA two years and ten months after accident). The MBTA liability provision also covers non-passenger bystanders who sustain injuries at the MBTA's hands. ch. 161A, § 38. Although the

The MBTA receives this preferential treatment pursuant to a separate liability statute that has a shorter statute of limitations than the general limitations period.⁶

On January 2, 2009, at the commencement of the first session of the 186th General Court of the Commonwealth of Massachusetts, Representative Eugene O'Flaherty of Chelsea proposed "An Act Relative to the Statute of Limitations for the Massachusetts Bay Transportation Authority."⁷ O'Flaherty's proposed legislation, House of Representatives Bill 3284 (H.R. 3284), would amend chapter 161A (Chapter 161A), section 38 of the Massachusetts General Laws by extending the statute of limitations for personal injury, property damage, and wrongful death actions against the MBTA from two years to three.⁸ Currently, the limitations period for these actions against the MBTA is one year shorter than the state's general limitations period for such actions.⁹ H.R. 3284

statutory language requires the bystander to exercise due care to recover, the Supreme Judicial Court, in dicta, has stated that the inclusion of the comparative negligence doctrine into Massachusetts law impliedly repeals the strict due care requirement. *Mirageas v. Mass. Bay Transp. Auth.*, 465 N.E.2d 232, 234-35 (Mass. 1984).

6. Compare ch. 161A, § 38 (providing limitations period for MBTA), with MASS. GEN. LAWS ch. 260, § 2A (2006) (providing limitations period for general tort and personal injury contract actions brought in Massachusetts). Although the MBTA limitations statute does not explicitly mention contract actions for personal injury, as its general counterpart does, the Supreme Judicial Court held that the MBTA's liability provision applies to such actions because a personal-injury claim for negligence against the MBTA in contract would require the same elements of proof as a tort action. *Thomas*, 450 N.E.2d at 601-02 (rejecting argument that contract action for personal injury falls outside MBTA's liability provision). The only difference in proof in a suit against the MBTA in contract and tort for personal injury is that the plaintiff in the contract action must establish patronage at the time of the incident. *Id.* at 602.

7. H.R. 3284, 186th Gen. Ct., 1st Sess. (Mass. 2009). O'Flaherty proposed similar legislation in the two previous legislative sessions, but each time the bill stalled in committee. See H.R. 3590, 185th Gen. Ct., 1st Sess. (Mass. 2007); H.R. 2044, 184th Gen. Ct., 1st Sess. (Mass. 2005) (seeking to amend MBTA limitations period to three years); House, No. 3590, <http://www.mass.gov/legis/185history/h03590.htm> (last visited Mar. 20, 2009) (providing bill history); House, No. 2044, <http://www.mass.gov/legis/184history/h02044.htm> (last visited Mar. 20, 2009) (recounting bill history). In 2003, Senators Robert Creedon, Jr. and Robert Havern filed the same bill in the Senate and the Joint Committee on Transportation ordered a study on it, but the bill failed to make it out of committee. S. 183-1858, 1st Sess., at 1 (Mass. 2003) (proposing same amendment as H.R. 3284); see MASSACHUSETTS GENERAL COURT, BILL HISTORIES FOR 2003-04 SESSION, 2458, 2624 (2004) (providing history of bill and study order).

8. H.R. 3284, 186th Gen. Ct., 1st Sess. (Mass. 2009) (proposing amendment of Chapter 161A as related to limitations of actions). Chapter 161A, section 38 reads, in part:

[t]he authority shall be liable in tort to passengers, and to persons in the exercise of due care who are not passengers or in the employment of the authority, for personal injury and for death and for damages to property in the same manner as though it were a street railway company; provided that any action for such personal injury or property damage shall be commenced only within two years next after the date of such injury or damage and in case of death only within two years next after the date of the injury which caused the death.

MASS. GEN. LAWS ch. 161A, § 38 (2006).

9. MASS. GEN. LAWS ch. 260, § 2A (2006) (establishing general statute of limitations for tort and contract actions for personal injury and replevin). The two limitations statutes originally contained the same time period, because chapter 260, section 2A of the Massachusetts General Laws included a two-year limitations period when the legislature added Chapter 161A to the General Laws in 1964. See 1948 Mass. Acts

would bring the MBTA's statute of limitations back in line with the general limitations period, as it was when Chapter 161A became law.¹⁰

The need for this change arises from two historical developments since the creation of the MBTA.¹¹ In 1964, when the Massachusetts legislature enacted Chapter 161A and created the MBTA, chapter 260 (Chapter 260) of the Massachusetts General Laws established a two-year limitation on tort actions.¹² The discrepancy between the general statute of limitations and the one in Chapter 161A emerged in the 1970s when the Massachusetts legislature reworked Chapter 260 and adding an extra year to the general limitations period.¹³ A decade and a half later, the state and the MBTA agreed to perform numerous service and infrastructure upgrades in connection with Boston's Central Artery/Third Harbor Tunnel (Big Dig) construction project.¹⁴ Although some of these upgrades are complete, some remain outstanding, others have been withdrawn, and a few of those completed have left the communities that they serve unhappy.¹⁵

249, 249 (enacting new set of limitations on actions at chapter 274 of 1948 Acts); *see also* MASS. GEN. LAWS ANN. ch. 260, § 2A (Michie 1968) (providing 1960s version of general statute of limitations); 1964 Mass. Acts 429, 429, 434 (adding Chapter 161A and establishing MBTA). In 1973, the Massachusetts legislature amended Chapter 260 section 2A to make the limitations period three years instead of two, but did not touch the MBTA statute of limitations. 1973 Mass. Acts 761, 761-62 (amending portions of Chapter 260); *see infra* Part II.B (discussing amendment of Chapter 260).

10. *See* H.R. 3284, 186th Gen. Ct., 1st Sess. (Mass. 2009) (proposing legislation to make MBTA's statute of limitations three years).

11. *See* Conservation Law Found. v. Romney, 421 F. Supp. 2d 344, 347 (D. Mass. 2006) (summarizing MBTA's conduct in creating projects to offset Big Dig environmental concerns); 1973 Mass. Acts 761, 761-62 (changing general limitations period to three years); *see also infra* note 13 (describing changes made during 1973 legislative session); Part II.D (reviewing MBTA's problems following upgrade regulations).

12. *See* MASS. GEN. LAWS ANN. ch. 260, § 2A (Michie 1968) (limiting time in which person may bring claim for certain actions); *see also* 1948 Mass. Acts 249, 249 (amending Chapter 260 to language present in 1964).

13. 1973 Mass. Acts 761, 761-62 (enacting chapter 777 of 1973 Massachusetts Acts and Resolves). Chapter 777 was "[a]n Act changing the statute of limitations for tort actions." *Id.* at 761. Section 1 of the Act states, "[s]ection 2A of chapter 260 of the General Laws . . . is hereby amended by striking out, in line 4, the word 'two' and inserting in place thereof the word: - three." *Id.*; *see* MASS. GEN. LAWS ch. 260, § 2A (2006) (limiting actions to three years).

14. *See* 310 MASS. CODE REGS. 7.36 (2007) (detailing current MBTA obligations under Big Dig mitigation agreement). The state added various MBTA upgrades to the Massachusetts Regulations after the 1990 mitigation agreement, but modified the requirements in 2006 in an attempt to increase the air quality further. 1066 Mass. Reg. 73 (Dec. 1, 2006) (amending 310 MASS. CODE REGS. 7.36 to comply with Commonwealth's revised clean air plan); Mac Daniel, *State Agrees to Design Link Between Red and Blue Lines: Deal Is Struck on Transit Suit*, BOSTON GLOBE, Nov. 30, 2006, at A1 [hereinafter Daniel, *State Agrees to Design Link*] (describing changes to MBTA's Big Dig obligations).

15. *See* Anthony Flint, *As Post-Dig Transit Projects Stall, Lawsuit Looms*, BOSTON GLOBE, Nov. 8, 2004, at B1 [hereinafter Flint, *Lawsuit Looms*] (describing delays in MBTA projects and summarizing history of agreements); Jack Healy, *Silver Line Opens to Fanfare, Protests: MBTA Touts Bus; Groups See 'Sham'*, BOSTON GLOBE, July 21, 2002, at B2 (reporting mixed reviews and criticisms of Roxbury's Silver Line during initial period); *Improving Public Transit in Boston: The Big Dig Is Not Nearly as Close to Being Finished as the Media Would Have Us Believe*, CONSERVATION MATTERS, Sept. 22, 2004, at 44 [hereinafter *Improving Public Transit*] (acknowledging completion of some MBTA upgrades, but detailing poor status of others).

This Note examines the creation of the MBTA and its special liability statute.¹⁶ It also inspects the amendment of the general limitations statute for the types of claims the special MBTA statute covers.¹⁷ The Note then explores the change from highway development to transit development in Boston's Southwest Corridor.¹⁸ Then it reviews the agreements Massachusetts and the MBTA made during the planning, development, and construction of the Big Dig.¹⁹ This Note analyzes whether the legislature should revoke the MBTA's limitations period exception in light of statutory history, the Supreme Judicial Court's misinterpretation of that history, and the MBTA's failure to perform its legally and non-legally binding obligations.²⁰ Given that the Massachusetts legislature did not intend to provide the MBTA with an exception to the limitations period and the MBTA has failed to provide necessary infrastructure upgrades that the state promised, the Joint Committee on Transportation should positively report on and the legislature should pass H.R. 3284 rather than leave it on the floor once more.²¹

II. HISTORY

A. Creation of the MBTA

In the years following World War II, as the war's prohibitive effect on automobile production ended, Massachusetts focused its plan for transportation improvements on highways.²² Bostonians witnessed the construction of major highway projects in the city during the 1950s such as the Central Artery, Southwest Expressway, and the Boston section of the Massachusetts Turnpike.²³ Despite increased resistance to highway development at the start of

16. See *infra* Part II.A (reviewing enactment of Chapter 161A and creation of MBTA).

17. See *infra* Part II.B (discussing process and effects of Chapter 260 section 2A amendment).

18. See *infra* Part II.C (reviewing elimination of Southwest Expressway plan and realignment of Orange Line).

19. See *infra* Part II.D (outlining state's attempt to mitigate potential environmental impact by upgrading infrastructure).

20. See *infra* Part III (analyzing reasons legislature should modify Chapter 161A section 38).

21. See *infra* Part IV (concluding H.R. 3284 valid method of rectifying problems associated with limitations period discrepancy).

22. See MASS. DEP'T OF PUB. WORKS, MASTER HIGHWAY PLAN FOR THE BOSTON METROPOLITAN AREA (1948), <http://www.bostonroads.com/history/1948-plan/> (last visited Mar. 20, 2009) (describing post-war traffic increase and proposing highway improvements); see also ALLAN K. SLOAN, CITIZEN PARTICIPATION IN TRANSPORTATION PLANNING: THE BOSTON EXPERIENCE 10-14 (1974) (summarizing Boston's post-war transportation structure and proposed modernization). The 1948 plan, which the state followed for roughly two decades, proposed a series of new expressways radiating into the center of Boston from Route 128 to a new concentric highway that would run through Somerville, Cambridge, Allston, Brookline, and Roxbury called the Inner Belt. MASS. DEP'T OF PUB. WORKS, *supra*; see Inner Belt Expressway (I-695 and I-95, unbuilt), <http://www.bostonroads.com/roads/inner-belt/> (last visited Mar. 20, 2009) (summarizing history and proposed path of Inner Belt highway).

23. See RALPH GAKENHEIMER, TRANSPORTATION PLANNING AS RESPONSE TO CONTROVERSY: THE

the 1960s—a result of the displacement involved in the construction of these highways in places like Allston, Dorchester, and Milton—the city and state's plans still called for expanded highways to improve traffic flow into and around Boston.²⁴ To most government officials, more highways were the answer to the city's growing traffic woes.²⁵

As the population shifted away from downtown Boston and the automobile reemerged after World War II, Boston's traffic increased while patronage on the state's public transportation system declined.²⁶ The Metropolitan Transit Authority (MTA), a 1947 creation of the legislature that replaced the various private streetcar and subway lines, struggled to remain operational as ridership dropped.²⁷ By 1960, the MTA was operating with a budget deficit approaching \$15 million.²⁸ Compounding the problem, the MTA had taken over a transit system that competitive private entities built in stages, resulting in different types of equipment used on the various streetcar and rapid transit lines.²⁹

BOSTON CASE 21 (1976) (describing Boston's early highway construction); *see also* John F Fitzgerald Expressway-Central Artery (I-93, US 1, and MA 3), <http://www.bostonroads.com/roads/central-artery/> (last visited Mar. 20, 2009) (providing construction history of Boston's Central Artery).

24. *See* BOSTON REDEVELOPMENT AUTH., 1965/1975 GENERAL PLAN FOR THE CITY OF BOSTON AND THE REGIONAL CORE 114 (1965) (including construction of Inner Belt in updated city development plan); SLOAN, *supra* note 22, at 20-22, 24 (detailing gradual increase in highway opposition and noting continued inclusion of highways in recommended plans); Robert Preer, *Six Lanes, No Waiting*, BOSTON GLOBE, Aug. 12, 2007, at South 1 (recalling stories of displacement Southeast Expressway construction caused); Interview by Public Broadcasting Service with Fred Salvucci, former Mass. Sec'y of Transp., at 4-5 (July 2002), *available at* <http://www-tc.pbs.org/greatprojects/interviews/salvucci.pdf> [hereinafter Salvucci Interview] (providing stories of persons Turnpike construction displaced); *see also* GAKENHEIMER, *supra* note 23, at 260-62 (reviewing theoretical residential dislocation problems associated with highway development).

25. *40 Cars Crash on S.E. Expressway*, BOSTON GLOBE, Dec. 27, 1963, at Morning 8 (stating traffic delays police and fire officials from reaching crash site); Jeremiah V. Murphy, *Traffic Snarl One of Worst*, BOSTON GLOBE, Dec. 31, 1963, at Morning 1 (reporting stalled traffic along expressways and surface streets); *see* Message, *supra* note 1, at 3 (discussing demand for highways as response to traffic problems).

26. *See* 2 CENT. TRANSP. PLANNING STAFF, THE TRANSPORTATION PLAN FOR THE BOSTON REGION C6, C10 (1993), *available at* <http://ntl.bts.gov/DOCS/boston.html> [hereinafter TRANSPORTATION PLAN] (discussing history of Boston's public transportation); *see also* 3 OFFICE OF TECH. ASSESSMENT, AN ASSESSMENT OF COMMUNITY PLANNING FOR MASS TRANSIT: BOSTON CASE STUDY 3 (1976), *available at* <http://ntl.bts.gov/lib/000/500/585/7604.pdf> [hereinafter BOSTON CASE STUDY] (providing statistical data of Boston's population decrease). The 8.1 percent decrease in Boston's population from 1960 to 1970 corresponded with an 11.3 percent increase in the population of the suburbs around the city. BOSTON CASE STUDY, *supra*, at 3.

27. *See* TRANSPORTATION PLAN, *supra* note 26, at C10 (describing attempts to determine way to boost ridership). The MTA, unlike its successor, only dealt with rapid transit and consisted of fourteen cities and towns. *See* Message, *supra* note 1, at 10 (indicating patronage of public transportation spread beyond fourteen cities and towns making up MTA). Those cities and towns were the extent of the transit system at the time, as made up by the Boston Elevated Railway, the Boston Transit Department, and their lessees. *See* BRADLEY H. CLARKE, RAPID TRANSIT BOSTON: BULLETIN NUMBER NINE 1-2 (1971) (providing succinct history of Boston's streetcars and rapid transit trains).

28. BOSTON CASE STUDY, *supra* note 26, at 6 (describing financial problems of Boston's transit system). A number of problems contributed to the MTA's deficit, including union-protected high salaries for its employees, outdated equipment, and use of oil-burning plants it owned to generate power. *Id.*

29. *Id.* (noting development of Boston's transit system with non-interchangeable modes); *see* TRANSPORTATION PLAN, *supra* note 26, at C1 (tracing early history of private transit companies in development of Boston's transit system).

Other privately owned modes of transportation, such as bus lines and commuter railroads, also faced ridership problems; many were on the verge of closing.³⁰ With ridership into Boston at its lowest point in ninety years and railroads declaring bankruptcy or preparing discontinuation of service, state officials recognized that private rail companies would not be able to maintain the commuter rail without some form of public assistance.³¹ According to 1963 and 1964 studies, the most important factor in reviving public transportation was increased service.³²

In light of the transportation problems in greater Boston, Governor Endicott Peabody appeared before a joint session of the Massachusetts legislature on April 21, 1964 and proposed a radical overhaul of the state's public transportation infrastructure.³³ Peabody sought to replace the existing MTA with the new MBTA in an attempt to bring control over the entire public transportation system under one roof.³⁴ By doing so, Peabody hoped that increased use of an efficient public transportation system would solve the financial crisis in the transportation sector and ease the burden on highway infrastructure.³⁵

30. See Message, *supra* note 1, at 3 (predicting increase in automobile traffic resulting from potential closure of buses and passenger trains); see also Mass. Bay Transp. Auth. v. Boston Safe Deposit & Trust Co., 205 N.E.2d 346, 349-50 (Mass. 1965) (providing background on transportation crisis and MBTA's remedial plans); TRANSPORTATION PLAN, *supra* note 26, at C10 (indicating decline in commuter rail patronage and resulting deficits). After World War II, commuter railroads between Boston and its suburbs faced a dramatic drop in patronage, because suburban development of homes and shopping centers away from rail lines encouraged people to use automobiles. See THOMAS J. HUMPHREY & NORTON D. CLARK, BOSTON'S COMMUTER RAIL 13 (1985) (detailing Boston's post-war rail history).

31. See HUMPHREY & CLARK, *supra* note 30, at 15 (indicating failure of privately operated commuter rail service in Boston). The private railroads gave up commuter rail service as bankruptcies loomed, but only after the MBTA existed and elected to take over, despite its own commuter rail problems. See *id.* at 15-16.

32. TRANSPORTATION PLAN, *supra* note 26, at C10 (reporting methods and results of studies on greater Boston transportation). The state commenced the Boston Regional Planning Project in 1963 and the Mass Transportation Demonstration Project in 1964 to determine the causes of and potential solutions for the transportation crisis. *Id.*

33. Mass. H. Jour., at 1547 (1964) (noting Governor's delivery of message to legislature); Message, *supra* note 1, at 6-14 (summarizing four part plan designed to rehabilitate state's public transportation). In the first part of the plan, the state would be responsible for paying ninety percent of infrastructure costs, whereas individual cities and towns, which covered the entire cost under the existing system, would only pay ten percent. See Message, *supra* note 1, at 7. Parts two and three of the plan called for the creation of regional transportation authorities throughout the state, including a new authority for greater Boston to replace the existing MTA. See *id.* at 9-13. The final part of the plan required the Department of Public Works to coordinate planning of all of the state's transportation, not just highways. See *id.* at 13-14.

34. See Message, *supra* note 1, at 12-13 (detailing expanded powers of MBTA); see also CLARKE, *supra* note 27, at 2 (commenting on broad power of MBTA). Whereas the MTA only operated the city's rapid transit and former streetcar system, Peabody's vision of the MBTA had, in addition to power over rapid transit, the ability to subsidize and contract with private commuter railroads and bus lines. See S. J. Micciche, *Peabody Asks \$200 Million Transit*, BOSTON GLOBE, Apr. 21, 1964, Evening, at 1 (highlighting elements of Peabody's transportation proposal).

35. See Message, *supra* note 1, at 3 (describing problems for both public and automobile transportation). Peabody stressed the dual nature of the crisis in his message to the legislature, commenting that railroads and buses were on the verge of shutdown while the state's highways were already overcrowded, leading to demand

Although reluctant at first, the legislature considered Peabody's proposed bill.³⁶ Less than two months later, the legislature enacted chapter 563 of the 1964 Acts and Resolves, a comprehensive piece of legislation that included the enactment of Chapter 161A, the enabling statute for the MBTA.³⁷ To ensure a smooth transition, the legislature abolished the MTA and transferred all its assets and liabilities to the MBTA.³⁸ The MBTA came into existence on August 3, 1964, and Peabody declared that the transportation problem was "on its way to solution."³⁹

As part of Chapter 161A, the legislature included a section on liability because the MBTA would be otherwise protected from liability under the doctrine of sovereign immunity.⁴⁰ The liability provision allowed passengers of the MBTA to sue the authority for personal injury, property damage, and wrongful death to the same extent that a passenger would be able to sue a private street railway.⁴¹ Additionally, non-passengers who suffered tortious injury caused by the MBTA and were not contributorily negligent could also

for further expansion of the highway system. *Id.*

36. S. 153-830, 2d Sess., at 1 (Mass. 1964) (transmitting Peabody's proposed bill to legislature); James S. Doyle, *The Chances*, BOSTON GLOBE, Apr. 22, 1964, at Morning 1 (reporting legislative reaction to Peabody's message and legislative proposal); see Mass. H. Jour., at 2680-81 (1964) (summarizing legislative history of enactment of Chapter 161A). Although initially legislators publicly applauded Peabody's plan, many seemed willing to let the enormous piece of legislation sit on the table without action, or at least wait until the legislature reconvened in 1965 to address the issue. Doyle, *supra*. When push came to shove, the legislature adopted neither of these strategies, instead fast-tracking the package to enactment on June 17, 1964. Mass. H. Jour., at 2058-60 (1964).

37. 1964 Mass. Acts 429, 434-457 (enacting MBTA enabling legislation); Mass. H. Jour., at 2058-60 (1964); Mass. S. Jour., at 1353 (1964) (recording enactment); see *Lavecchia v. Mass. Bay Transp. Auth.*, 804 N.E.2d 932, 935-36 (Mass. 2004) (describing creation of MBTA). The legislature created an authority that was, by statute, a political subdivision of the Commonwealth—a public entity much like a school district. See *Mass. Bay Transp. Auth. v. Boston Safe Deposit & Trust Co.*, 205 N.E.2d 346, 350-51 (Mass. 1965) (describing MBTA's political placement and sovereign powers).

38. 1964 Mass. Acts 429, 457 (making MBTA direct successor to MTA in section 20 of act).

39. CLARKE, *supra* note 27, at 20 (listing key dates in Boston's transit history); Robert B. Hanron, *MBTA Sworn In*, BOSTON GLOBE, Aug. 4, 1964, at Morning 1 (reporting on MBTA take-over ceremony).

40. 1964 Mass. Acts 429, 451-52 (establishing liability of MBTA in tort to passengers and third parties); see MASS. GEN. LAWS ch. 161A, § 38 (2006) (including original liability provision in revised version of Chapter 161A); *Lavecchia*, 804 N.E.2d at 936 (indicating application of sovereign immunity to MBTA without special statutory liability provision). The legislature retained the MBTA's liability provision in its 1999 revision of Chapter 161A, albeit in section 38 instead of section 21, because the Massachusetts Tort Claims Act specifically excluded the MBTA from the definition of a public employer. 1999 Mass. Acts 337, 865, 899 (amending Chapter 161A and renumbering liability provision section 38); 1978 Mass. Acts 842, 842-48 (establishing law allowing claims against Commonwealth); see MASS. GEN. LAWS ch. 258, § 1 (2006) (defining public employers, who could now be sued just like private entities); *Jomides v. Mass. Bay Transp. Auth.*, 488 N.E.2d 800, 803-04 (Mass. App. Ct. 1986) (explaining legislature's explicit exclusion of MBTA from public employer category), *aff'd*, 502 N.E.2d 137 (Mass. 1986).

41. ch. 161A, § 38 (making MBTA liable to passengers in tort); *Thomas v. Mass. Bay Transp. Auth.*, 450 N.E.2d 600, 601-02 (Mass. 1983) (extending MBTA's liability provision to contract actions for personal injury, death, and property damage); see 1964 Mass. Acts 429, 451 (enacting MBTA liability provision). The renumbering of the provision's section from twenty-one to thirty-eight came in 1999, when the legislature overhauled Chapter 161A. See *supra* note 40 (detailing 1999 legislation); *infra* note 45 and accompanying text (discussing retention of liability provision in 1999 legislation).

sue the MBTA.⁴² Although expressly making the MBTA subject to civil liability to passengers and non-patrons, the statute limited the liability to two years.⁴³ The legislature, in enacting the two-year statute of limitations, subjected the MBTA to the same period of liability to which other private entities were subjected in 1964.⁴⁴ Strike-and-replace legislation discarded other provisions of the original Chapter 161A in 1999, but the liability provision remained in place, in the same language, with only a change in the section of the chapter under which it is located.⁴⁵

B. Amendment of Chapter 260

In 1973, State Senator William Bulger introduced a petition to pass “[a]n Act applying the same statute of limitations to contract and tort actions.”⁴⁶ Bulger’s petition, Senate Bill 584 (S. 584), originally proposed a new six-year statute of limitations for actions covered by Chapter 260 section 2A.⁴⁷ The

42. ch. 161A, § 38 (creating liability for injuries suffered by non-patrons exercising due care); see 1964 Mass. Acts 429, 451 (enacting liability provision). The liability provision’s limitation applies regardless of whether the plaintiff, passenger or not, was engaged in a transportation-related activity at the time of the incident. *Lavecchia*, 804 N.E.2d at 937 (applying two-year limitation to passenger’s suit against MBTA for injury caused by hole in pavement). In 1984, the Supreme Judicial Court held that the legislature had impliedly repealed the statute’s strict requirement of due care for bystander plaintiffs by switching from contributory negligence to comparative negligence. *Mirageas v. Mass. Bay Transp. Auth.*, 465 N.E.2d 232, 234-35 (Mass. 1984).

43. ch. 161A, § 38; 1964 Mass. Acts 429, 451 (requiring commencement of tort actions against MBTA within two years).

44. Compare ch. 161A, § 38 (limiting liability of MBTA to two years), with MASS. GEN. LAWS ANN. ch. 260, § 2A (Michie 1968) (requiring commencement of actions in tort and contract for personal injury within two years). A decade later, the legislature amended the general statute of limitations to three years. 1973 Mass. Acts 761, 761-62; see MASS. GEN. LAWS ch. 260, § 2A (2006); *infra* Part II.B (discussing amendment and its effects).

45. See 1999 Mass. Acts 337, 865, 899 (enacting legislation containing new Chapter 161A and enacting same liability provision at section 38); see also *Lavecchia v. Mass. Bay Transp. Auth.*, 804 N.E.2d 932, 934 & n.2 (Mass. 2004) (discussing history of Chapter 161A section 38). The 1999 act striking and replacing Chapter 161A was omnibus legislation focusing on appropriations, not limitations periods. See 1999 Mass. Acts 337, 337. For example, part of the bill enacted chapter 34B of the Massachusetts General Laws, which abolished county governments as a way to save money. 1999 Mass. Acts 337, 797-815; see Frank Phillips, *The Ax Falls on Middlesex County Government*, BOSTON GLOBE, July 12, 1997, at A1 (reporting governor signed bill including plan for elimination of county governments by 1999).

46. S. 163-584, 1st Sess., at 1 (Mass. 1973) (proposing six-year statute of limitations for tort and personal injury contract actions); see Mass. S. Jour., at 3542 (1973) (summarizing history of S. 584).

47. S. 163-584, 1st Sess., at 1 (Mass. 1973) (seeking to change statute of limitations from two years to six). Limiting all tort and contract claims to six years would eliminate the need for courts to determine whether ambiguous claims were made in tort or contract. See *Kagan v. Levenson*, 134 N.E.2d 415, 417 (Mass. 1956) (declaring plaintiff’s claim contract action rather than tort action for conversion). Prior to 1948, Chapter 260 section 2 applied the same six-year statute of limitations to both actions in contract and tort. See *Moseley v. Briggs Realty Co.*, 69 N.E.2d 7, 10 (Mass. 1946) (stating tort actions must commence within six years under Chapter 260 section 2). Chapter 274 of the 1948 Acts and Resolves created separate and distinct statutes of limitations for the two causes of action and removed personal injury contract actions from the purview of the six-year limitations period. 1948 Mass. Acts 249, 249. This ensured that the same limitations period applied to all personal-injury actions, regardless of whether the cause of action was contract or tort. *Royal-Globe Ins. Co.*

legislature reconsidered the engrossed bill and shortened the extension of the statute of limitations to three years.⁴⁸ The House and Senate concurred in the amendment, both chambers enacted the three-year modification, and the governor signed it into law.⁴⁹ Though the legislature extended the general statute of limitations for basic tort and contract actions for personal injury from two years to three, it did not amend the MBTA's liability provision in Chapter 161A.⁵⁰ The result was a discrepancy in the length of time that a victim of personal injury, property damage, or wrongful death had to commence suit depending on whether the offending party was the MBTA.⁵¹

In 1982, the legislature's amendment of the general statute of limitations became a central issue of litigation when a MBTA bus struck a cyclist, Christopher Hearn, in Boston.⁵² The Supreme Judicial Court considered two arguments Hearn posed in his appeal: the MBTA's two-year statute of limitations violated his right to equal protection and the legislature had impliedly repealed the two-year limitations period in 1973.⁵³ Hearn argued that Chapter 161A section 21 violated his Fourteenth Amendment equal protection rights by forcing him to commence suit faster than other victims merely because a MBTA bus, rather than a privately owned vehicle, struck him.⁵⁴ Noting Hearn's "heavy burden" to prove a lack of rational basis in order to

v. Craven, 585 N.E.2d 315, 320 (Mass. 1992) (discussing Chapter 260 section 2A as making liability uniform for potential personal-injury defendants).

48. Mass. S. Jour., at 2170-71 (1973) (describing amendment of bill modifying statute of limitations).

49. 1973 Mass. Acts 761, 761-62 (changing statute of limitations for actions in Chapter 260 section 2A); Mass. S. Jour., at 2171, 3542 (1973) (recording action taken on bill after amendment and summarizing bill history). The three-year version of the bill, however, undermined the legislative purpose of eliminating the need for courts to construe ambiguous claims for limitations purposes. See, e.g., *Oliveira v. Pereira*, 605 N.E.2d 287, 289-91 (Mass. 1992) (concluding trial judge properly analyzed claim as tort); *Royal-Globe*, 585 N.E.2d at 319-21 (discussing proper statute of limitations application analysis in dicta); *Aimtek, Inc. v. Norton Co.*, 870 N.E.2d 1114, 1117-20 (Mass. App. Ct. 2007) (affirming trial judge's application of contract limitations period to bailment case). The *Aimtek* court noted that similar cases had been brought as contract actions, tort actions, and, occasionally, both. *Aimtek*, 870 N.E.2d at 1118.

50. 1973 Mass. Acts 761, 761-62 (amending limitations periods covered in Chapter 260); see MASS. GEN. LAWS ch. 161A, § 38 (2006) (maintaining two-year limitations period for such actions against MBTA); *Lavecchia v. Mass. Bay Transp. Auth.*, 804 N.E.2d 932, 936-37 (Mass. 2004) (citing legislature's amendments to similar limitations periods without modifying MBTA's limitations period). The legislature has had more than two decades to consider modification of the MBTA's statute of limitations after the Supreme Judicial Court expressly upheld the two-year limitations period. *Hearn v. Mass. Bay Transp. Auth.*, 450 N.E.2d 602, 603 (Mass. 1983); see *Lavecchia*, 804 N.E.2d at 937 (noting legislature's failure to act).

51. See *Hearn*, 450 N.E.2d at 603 (noting different statutes of limitations for actions against MBTA and private entity); see also *O'Brien v. Mass. Bay Transp. Auth.*, 541 N.E.2d 334, 336 (Mass. 1989) (rejecting argument legislature intended preferential treatment for MBTA).

52. *Hearn*, 450 N.E.2d at 603 (describing accident giving rise to suit and two main issues). Hearn sued the MBTA two years and ten months after the bus struck him, alleging negligence in the bus driver's operation and seeking personal-injury damages. *Id.* He appealed when the trial court granted the MBTA's motion to dismiss for an action barred by the statute of limitations. *Id.*

53. *Id.* (outlining arguments under consideration).

54. *Id.* at 604 (describing equal protection argument). Hearn argued there was no rational basis for the claimed disparate treatment. *Id.*

overcome the presumption of validity given to statutes such as Chapter 161A section 21, the court rejected the equal protection argument.⁵⁵ The court held that the legislature could have concluded that the MBTA deserved special protection from liability given “its special public obligations” and “its unique position as a provider of public transportation to a large segment of the population.”⁵⁶ The court then dismissed Hearn’s implied repeal argument, stating implied repeal only applies in instances of “repugnant” statutory contradiction and insinuating no such contradiction existed regarding the statutes in question.⁵⁷

C. *The Southwest Corridor*

Eighteen months after placing a moratorium on highway construction inside Route 128, Governor Francis Sargent gave a televised speech in November 1972 to officially announce the end of highway development in greater Boston.⁵⁸ Sargent also established a task force, the Boston Transportation Planning Review (BTPR), to examine the various plans for highway and transit development.⁵⁹ Instead of focusing the state’s transportation dollars on the plan to connect Interstate 95 through downtown Boston and add numerous new radial highways, Sargent earmarked the money for public transportation.⁶⁰ Sargent risked losing significant amounts of federal funding, which would only later be applicable to public transportation as well as interstate highways.⁶¹ Sargent’s plan, heavily influenced by the BTPR’s 1972 Final Report, combined the elimination of most of the highways proposed in the 1948 Master Highway

55. *Id.* (discussing burden of equal protection challenge).

56. *Hearn v. Mass. Bay Transp. Auth.*, 450 N.E.2d 602, 604 (Mass. 1983) (opining on legislature’s position to give preference to MBTA).

57. *See id.* Additionally, the court noted, Massachusetts law allows for specialized statutes of limitations such as the one for the MBTA. *Id.* at 604-05; *see* MASS. GEN. LAWS ch. 260, § 19 (2006) (stating Chapter 260 limitations periods not applicable when inconsistent with special limitations provisions). The court’s citation to section 10 is a typographic error, presumably, as that section deals with the effect of death on limitations periods. MASS. GEN. LAWS ch. 260, § 10 (2006).

58. *See* Peter J. Howe, *1972 Turnabout in Master Transportation Plan Still Felt Today*, BOSTON GLOBE, Dec. 6, 1987, at 44 [hereinafter Howe, *1972 Turnabout*] (revisiting Sargent’s 1972 speech on transportation). The speech culminated the Boston Transportation Planning Review’s year-and-a-half examination of the state’s transportation plan, which Sargent ordered shortly after he came into office. *Id.* Sargent previously supported a full network of spoke-and-wheel highways into and surrounding Boston, but reversed course when community groups in the affected areas spoke out against the highway plan. *Id.*; *see* Salvucci Interview, *supra* note 24, at 5-6 (describing involvement in and sentiment of antihighway movement).

59. *See* GAKENHEIMER, *supra* note 23, at 36, 42-43 (indicating BTPR’s purpose and describing BTPR’s composition and method). After an initial investigation of the transportation plan, the BTPR concluded a full scale restudy of the plan was necessary and used an open process conducive to citizen participation. *See* SLOAN, *supra* note 22, at 28-29, 35-36.

60. Howe, *1972 Turnabout*, *supra* note 58 (discussing application of funds to improvement and expansion of public transportation).

61. *Id.* (indicating plan’s reliance on federal approval of fund transfers). An integral part of Sargent’s plan involved Interstate transfer options that Congress approved two years later. *Id.* The transfer options allowed states to transfer federal funding intended for Interstate highways to other transportation needs. *Id.*

Plan and improvement of the MBTA infrastructure.⁶² These two aspects of Sargent's plan converged in one focal point of Boston transportation, the Southwest Corridor.⁶³

The Southwest Corridor was part of the transportation plan for greater Boston in one form or another since 1948, when the Master Highway Plan suggested a Southwest Expressway into the city.⁶⁴ When the MBTA came into existence, state officials modified the plan to make the corridor a combined highway-transit line.⁶⁵ Sargent's 1972 announcement killed the Southwest Expressway, but the state already controlled most of the land along its path.⁶⁶ The state and the MBTA decided to relocate the Orange Line from the elevated tracks along Washington Street in Roxbury to the Southwest Corridor in a plan that would combine the transit line with commuter rail and Amtrak service, as well as create new community development and a linear park.⁶⁷

Six years after Sargent decided the Orange Line would fill the corridor better

62. See TRANSPORTATION PLAN, *supra* note 26, at C17 (describing report's effect on plans for MBTA improvement and expansion); Howe, *1972 Turnabout*, *supra* note 58 (reviewing Sargent's reaction to report's recommendations). Although Sargent killed plans for highways such as the Inner Belt, his plan called for the completion of I-93 from the Central Artery to the Braintree split at Route 128. Howe, *1972 Turnabout*, *supra* note 58. It also permitted the development of the Central Artery and Third Harbor Tunnels, which later became part of the Big Dig. *Id.* (noting highway projects Sargent's plan did not eliminate).

63. See GAKENHEIMER, *supra* note 23, at 54-58 (describing history and review of Southwest Expressway); see also Southwest Expressway (I-95, unbuilt), <http://www.bostonroads.com/roads/southwest/> (last visited Mar. 20, 2009) (providing history of proposed highway).

64. MASS. DEP'T OF PUB. WORKS, *supra* note 22 (listing proposed highways and suggested locations). The planned path of the corridor, which followed along the rights-of-way of the New York, New Haven, and Hartford (Penn Central) Railroad, later became an even more ideal site when the MBTA purchased the property after taking control of existing railroad operations in greater Boston. See TRANSPORTATION PLAN, *supra* note 26, at C13 (detailing 1966 MBTA plan to utilize New Haven railroad right-of-way); see also BOSTON CASE STUDY, *supra* note 26, at 17 (indicating MBTA's plan coincided with negotiations to purchase corridor trackage).

65. SLOAN, *supra* note 22, at 56 (stating relocated Orange Line included in Southwest Expressway plan); see BOSTON CASE STUDY, *supra* note 26, at 16 (noting joint-highway-transit project plans); see also GAKENHEIMER, *supra* note 23, at 56-57 (noting inclusion of transit element in revised plan).

66. Howe, *1972 Turnabout*, *supra* note 58 (stating Sargent's plan ended inclusion of Southwest Expressway in state's transportation development); see GAKENHEIMER, *supra* note 23, at 168 (describing Southwest Corridor's future as transit-only project); Jack Thomas, *More Mass Transit, No X-ways—Sargent*, BOSTON GLOBE, Dec. 1, 1972, at 1 (reporting governor's new transportation plan). The state, which already owned the railroad rights-of-way in the corridor and had cleared 150 acres of land, including demolition of 775 housing units, elected to hold on to the land for a transit-based alternative. GAKENHEIMER, *supra* note 23, at 55, 58 (reviewing state's preconstruction actions in corridor and indicating Sargent planned for transit line through corridor); *id.* at 164 (stating chances low for private use of cleared land if state sold); Thomas, *supra* (discussing public works money and efforts already committed to Southwest Corridor land).

67. See Peter J. Howe, *New T Line Dedicated with Hopes for Future*, BOSTON GLOBE, May 3, 1987, at 37 [hereinafter Howe, *New T Line*] (describing Orange Line relocation to site viewed with eye for development); Martin F. Nolan, *Tracking History*, BOSTON GLOBE MAG., Apr. 26, 1987, at 14 (examining transition of land cleared for Southwest Expressway into transit line coupled with bike paths). The Southwest Corridor Park opened in May 1990, three years after the first Orange Line train navigated the new route to Forest Hills. Ellen O'Brien, *Two Neighborhoods Celebrate Completion of Park Projects*, BOSTON GLOBE, May 6, 1990, at 90 (reporting ceremony commemorating opening of park).

than a highway, the MBTA broke ground on the new alignment.⁶⁸ By 1987, the new line was ready for service, the parks were designed and in development, and the old elevated tracks were slated for demolition.⁶⁹ With the Orange Line now half a mile west of its old route, Roxbury residents in Dudley Square and along Washington Street wondered what the MBTA had in store to replace the old elevated line.⁷⁰ The MBTA rearranged its bus routes in Roxbury and Jamaica Plain to improve access to new Orange Line stations with a long-term goal of a “high-quality” bus or light-rail system replacing the old line.⁷¹ Rather than implement a permanent replacement plan prior to the service switch, the MBTA determined it would analyze the situation after it discontinued rail service along Washington Street.⁷² When it became clear that a new light-rail branch, including a tunnel to connect to the existing system, would be costly, disruptive, and not supported by federal funding, the MBTA started to move to a trackless option.⁷³

A decade later, in 1998, the MBTA approached a permanent solution when it unveiled plans for a new special bus line through Roxbury that would be part of the long-awaited South Boston Piers bus system.⁷⁴ The MBTA called the

68. Nolan, *supra* note 67 (noting 1978 groundbreaking after years of delays).

69. Peter J. Howe, *Highway Never Made It, but T Line Did*, BOSTON GLOBE, May 3, 1987, at 40 [hereinafter Howe, *Highway*] (reporting progress of Southwest Corridor development). Health concerns about lead paint on the structure caused disruptions in the demolition process, but the state completed the removal of the elevated tracks by the end of 1990. Jerry Ackerman, *El Is Down, Mood Is Up*, BOSTON GLOBE, Nov. 18, 1990, at A27; Peter J. Howe, *El Demolition Will Resume as T Funds Lead Removal*, BOSTON GLOBE, Sept. 22, 1988, at 90.

70. See Howe, *Highway*, *supra* note 69 (describing mixed opinions on replacement service along old Orange Line route). Many Roxbury residents demanded light-rail service, like the Green Line, through Dudley Square down Washington Street, and some claimed that the MBTA promised such service. *Id.*; Peter J. Howe, *T Riders Seek Better Bus Service Near Old El*, BOSTON GLOBE, Aug. 1, 1987, at 17 [hereinafter Howe, *T Riders*] (detailing community protests and surveys about replacement service).

71. See Howe, *Highway*, *supra* note 69 (listing possible replacements MBTA considered). The MBTA added a new bus route, number 49, which traveled Washington Street into downtown Boston with a planned frequency of six minutes. See *id.* Just three months after the realignment commenced, seventy-three percent of riders who used to use the elevated Orange Line rated replacement service, including but not limited to the 49 bus, fair or poor. Howe, *T Riders*, *supra* note 70 (reporting community reaction to Orange Line replacement).

72. See Desiree French, *In the Wake of the Old Orange Line, Community Leaders Say Plans for Reopened Washington Street Inadequate*, BOSTON GLOBE, Apr. 17, 1987, at 56 (indicating criticism toward MBTA for not making permanent replacement plan prior to service discontinuation).

73. Jerry Ackerman, *Orange Line Route Trolley Bus Favored by MBTA for El to Dudley*, BOSTON GLOBE, Jan. 17, 1989, at 18 (reporting MBTA’s movement toward trackless trolley in spite of community demand for rail option); see Peter J. Howe, *Washington Street Boston Coalition in Drive for Trolley Service Unhappy with Buses*, BOSTON GLOBE, Feb. 22, 1988, at 22 [hereinafter Howe, *Washington*] (indicating unlikelihood of federal funding for trolley construction). The Urban Mass Transportation Administration, which would ordinarily cover up to eighty percent of trolley line construction, rejected all three trolley options, including the \$64 million Washington line option community leaders preferred, as too expensive for any funding whatsoever. Howe, *Washington*, *supra*.

74. See Thomas J. Palmer, Jr., *In a Cloud of Long-term MBTA Plans, a Silver Line*, BOSTON GLOBE, Aug. 17, 1998, at B2 [hereinafter Palmer, Jr., *Cloud*] (reporting MBTA’s release of initial Silver Line plans). At the time, the proposal left many questions unanswered, such as what type of buses would be utilized, whether the buses would have a dedicated lane, and how the buses would make the downtown connection between

new line the Silver Line, indicating that it would be treated, at least superficially, like the MBTA's other color-coded rapid transit and light-rail lines rather than its numbered bus routes.⁷⁵ In late 2000, the MBTA broke ground on the Washington Street branch of the Silver Line, and on July 20, 2002, the first bus made the run from Dudley Square into downtown Boston.⁷⁶

Though Roxbury residents finally had an upgraded replacement for the old Orange Line, critics—from Roxbury to the State House—derided the Silver Line because it shared many of the problems encountered by the buses it replaced.⁷⁷ Some opponents alleged that the MBTA discriminated against the

Washington Street and South Boston. *Id.* Silver Line Phase III, the downtown connection between the Roxbury and Waterfront branches remains unresolved. See Jaclyn Trop, *Silver Line's Bus Tunnel Debated*, BEACON HILL TIMES, Nov. 7, 2006, at 2 [hereinafter Trop, *Bus Tunnel Debated*] (describing variety of criticisms toward MBTA at community meeting); Jaclyn Trop, *Silver Line Draws Criticism*, BEACON HILL TIMES, July 18, 2006, at 3 [hereinafter Trop, *Silver Line Draws Criticism*] (reviewing MBTA plans for Silver Line connection); see also MBTA, http://www.mbta.com/about_the_mbta/t_projects/?id=1072 (last visited Mar. 20, 2009) (providing information about Phase III plans, alternatives, and community outreach). In October 2008, the MBTA announced its intention to move forward with Phase III despite the agency's poor financial condition and expectations of community opposition, but sources at the Federal Transit Administration (FTA) indicated that the FTA was likely going to downgrade Phase III's rating in a February 2009 report. Noah Bierman, *Questions Arise How T Plans to Fund \$1B Silver Line Project*, BOSTON GLOBE, Oct. 14, 2008, at 1 [hereinafter Bierman, *Questions Arise*] (reporting reaction to MBTA's decision to move forward on Phase III); Noah Bierman, *Silver Line Faces Loss of Funding for Last Link*, BOSTON GLOBE, Dec. 11, 2008, at 1 [hereinafter Bierman, *Silver Line Faces Loss*] (revealing anonymous FTA source indicating likely downgrade). If the FTA downgrades Phase III, the MBTA would not qualify for federal funding that would match sixty percent of the final design cost. See Bierman, *Silver Line Faces Loss*, *supra*.

75. See Editorial, *Just a Bunch of Buses*, PROV. J. BULL., Sept. 2, 2005, at B4 (indicating MBTA's treatment of Silver Line as part of color-coded rapid transit system); MBTA, http://www.mbta.com/schedules_and_maps/subway/ (last visited Mar. 20, 2009) (providing subway line map and schedules, including Silver Line). Although the MBTA outwardly treated the new line as part of its transit system, former MBTA General Manager Robert Prince emphasized that what was important about the creation of the Silver Line was not whether it was more like a bus or more like a train, but that after fourteen years of poor bus service to Roxbury, the MBTA was finally putting something new in place to see if it would work. Jim Duffy, *Silver Lining in Boston*, MASS TRANSIT, Nov. 1, 2000, at 10 (indicating Prince's progressive view of Silver Line).

76. See Healy, *supra* note 15 (describing mixed reaction to commencement of Silver Line service); Raphael Lewis, *Amid Protest, Ground Broken for New Bus Route*, BOSTON GLOBE, Sept. 29, 2000, at B5 [hereinafter Lewis, *Amid Protest*] (indicating praise outweighed turmoil surrounding groundbreaking). The buses used on the Silver Line—sixty-foot, dual-power, low-emission vehicles—provide more capacity than those in the MBTA's diesel fleet and are tracked by satellite to maintain scheduling and separation between buses. Duffy, *supra* note 75 (describing features of Silver Line buses); see Anthony Flint, *T Touts Rapid Bus Transit as Wave of Future but Some Say Service Is Cheap Alternative*, BOSTON GLOBE, Oct. 20, 2003, at B1 [hereinafter Flint, *T Touts Rapid Bus Transit*] (indicating new Silver Line buses part of MBTA's larger bus overhaul).

77. Healy, *supra* note 15 (contrasting MBTA's praise of line with community's complaints and criticisms). State Representative Gloria Fox went so far as to call the new service "just a gray bus." *Id.* The Silver Line is an example of bus rapid transit, a form of transportation gaining steam nationwide because of federal promotion, but buses on the Washington Street branch of the Silver Line battle traffic in their designated lanes on the far right of the street, whereas buses on the Waterfront branch, opened two years later, drive through an exclusive tunnel for the majority of the branch's route. See *id.* (describing problem buses face navigating partially obstructed designated lanes); Press Release, U.S. Dep't of Transp., FTA Announces Projects Selected for Bus Rapid Transit Demonstration Program (June 8, 1999) (including Boston's Silver Line as one of ten projects selected), available at 1999 WL 401338; Trop, *Silver Line Draws Criticism*, *supra* note

neighborhood's African-American population by replacing rail service with a glorified bus, claiming the MBTA would never try such a maneuver in other parts of the city.⁷⁸ The uproar surrounding the Silver Line as a replacement for the old Orange Line continues today, as riders on the Washington Street branch remain disconnected from the rest of the rapid transit infrastructure until the MBTA completes Phase III of the Silver Line.⁷⁹

D. The MBTA and the Big Dig

In 1987, Massachusetts secured the necessary federal funding to begin work on a massive highway reconstruction project that involved depressing the Central Artery and constructing a third harbor tunnel between downtown and East Boston.⁸⁰ Called the "Big Dig," the highway project was the lone survivor of Governor Sargent's decision to terminate highway construction in the greater Boston area.⁸¹ The purpose of the project was twofold: restore Boston's surface by eliminating the elevated Artery and alleviate the traffic pressure on the city's downtown highways and tunnels.⁸² Despite opposition from the

74 (describing Phase II's use of dedicated tunnel through South Boston). According to a test the *Boston Globe* conducted in 2004, a 2.2 mile rush hour ride on the Silver Line took, on average, twenty-five percent longer than equivalent rides on the Red, Green, and Orange Lines. Anthony Flint, *Silver Line Not the Shiniest Commute*, BOSTON GLOBE, Feb. 23, 2004, at A1 [hereinafter Flint, *Silver Line Not the Shiniest*] (reporting results of MBTA ride-duration test).

78. Anthony Flint, *Suit Claims Mass Transit Disparity*, BOSTON GLOBE, Mar. 11, 2000, at A1 [hereinafter Flint, *Suit*] (describing planned suit against MBTA for poor service and planning in low-income areas); see Raphael Lewis, *No Silver Polish*, BOSTON GLOBE, July 23, 2002, at B1 [hereinafter Lewis, *No Silver Polish*] (noting criticisms for inferior service in heavily minority and low-income neighborhoods). Although the MBTA had not broken ground on the Silver Line's Washington Street branch when the coalition filed its complaint of civil rights violations with the U.S. Department of Transportation, part of the complaint alleged that the MBTA's plans for the Silver Line to run on the street with general traffic exemplified unequal service. See Flint, *Suit*, *supra*.

79. Flint, *Silver Line Not the Shiniest*, *supra* note 77 (describing connection problems between Silver Line Washington Street branch and other MBTA lines); Trop, *Bus Tunnel Debated*, *supra* note 74 (indicating community desires better connection to rest of system). But see Bierman, *Questions Arise*, *supra* note 74 (reporting public support of and opposition to moving forward with Phase III).

80. See Jason H. Peterson, Note, *The Big Dig Disaster: Was Design-Build the Answer?*, 40 SUFFOLK U. L. REV. 909, 921-22 (2007) (summarizing early history of Big Dig). The idea to combine two major projects, an underground replacement for the Central Artery and a third harbor tunnel, came during Governor Michael Dukakis's second administration. *Id.* at 921. In the mid-1970s, during his first administration, Dukakis had supported Secretary of Transportation Fred Salvucci's idea to build a new tunnel downtown to replace the artery. *Id.* at 921 & n.105. Edward King, governor in between the two Dukakis administrations, did not further the Central Artery redesign. *Id.* at 921 n.106. Instead, Governor King developed the idea to add a third tunnel underneath Boston Harbor to improve access to Logan International Airport. *Id.* When re-elected, Dukakis included King's idea in his revived project, which became the basis for the Big Dig, at Salvucci's urging. *Id.* at 921-22 & n.107; see Salvucci Interview, *supra* note 24, at 11-12 (discussing proposal of combined project to Dukakis).

81. See Howe, *1972 Turnabout*, *supra* note 58 (noting Sargent's support for projects included in Big Dig); Salvucci Interview, *supra* note 24, at 7-8 (discussing Sargent's support for Central Artery and Harbor Tunnel projects).

82. Salvucci Interview, *supra* note 24, at 13 (commenting on aesthetic and practical goals of Big Dig).

Reagan administration, a bipartisan Massachusetts delegation that included notable Republicans, such as former Governor and U.S. Secretary of Transportation John Volpe and Congressman Silvio Conte, secured the funding and clearances needed to proceed with construction.⁸³

The goal of the Big Dig's supporters was to reduce traffic in Boston by opening up the city's major roads, but opponents of the plan saw the possibility of an increase in the city's traffic capacity and a corresponding increase in air pollution.⁸⁴ As the Commonwealth broke ground, the Conservation Law Foundation (CLF) threatened to sue the state for violations of the Clean Air Act.⁸⁵ Although a tentative agreement between the state and environmentalists was already in place, state and federal officials announced that they would not follow the guidelines even if the Environmental Protection Agency sought to enforce the agreement.⁸⁶ By bringing suit against the Commonwealth, the CLF hoped to obtain a tougher agreement, which would be included in the state's Clean Air Act compliance plan, to alleviate the effects of the Big Dig by improving public transportation and parking restrictions.⁸⁷

Before the parties were to appear in court, they reached a new agreement, which made mitigation efforts part of the state's compliance plan and state environmental regulations.⁸⁸ The agreement enumerated improvements to the MBTA infrastructure that would qualify for compliance, but allowed for construction of alternative improvements in place of the listed items.⁸⁹ The

According to Salvucci, an increase in traffic volume was not a goal of the Big Dig because it would not solve the problem being addressed: traffic jams in downtown Boston. *Id.*

83. Salvucci Interview, *supra* note 24, at 12-14 (recognizing Republican involvement in Big Dig and hypothesizing Reagan administration delayed Big Dig four years); *see* Peterson, *supra* note 80, at 921-22 & n.108 (discussing how delegation overcame opposition and secured funding).

84. *See Improving Public Transit*, *supra* note 15 (indicating environmental group perceived environmental threat from Big Dig).

85. *Improving Public Transit*, *supra* note 15 (detailing basis for suit). The environmental watchdog group alleged the expanded highway system would dramatically increase the number of cars entering the city, without increasing the capacity of the city's streets, leading to heavy local traffic and increased pollution. *See id.*; *see also* Michael S. Lelyveld, *Environmentalists Vow Suit to Block Mass. Highway Project*, J. COM., May 30, 1991, at 2B (reporting potential suit despite agreement to increase public transportation and limit city parking).

86. *See* Lelyveld, *supra* note 85 (indicating officials' reversal caused groups to file suit).

87. Peter J. Howe & Gary S. Chafetz, *Accord Lifts a Roadblock to Big Dig*, BOSTON GLOBE, Mar. 13, 1992, at 1 (indicating goal environmental groups sought in bringing suit).

88. *See* MASS. DEP'T OF ENVTL. PROT., BACKGROUND DOCUMENT AND TECHNICAL SUPPORT FOR PUBLIC HEARINGS ON THE PROPOSED AMENDMENTS TO THE STATE IMPLEMENTATION PLAN FOR OZONE 2 (2005), available at <http://www.mass.gov/dep/air/laws/cattsd.pdf> [hereinafter BACKGROUND DOCUMENT] (providing history of agreement); Howe & Chafetz, *supra* note 87 (reporting proposed settlement agreement); *see also* Peter J. Howe, *MBTA Could Face a Lawsuit Over Uncompleted Work*, BOSTON GLOBE, July 2, 1998, at B3 [hereinafter Howe, *MBTA Lawsuit*] (indicating state environmental agency has power to enforce Clean Air Act compliance plan). The regulations set in the agreement went into effect in the Code of Massachusetts Regulations on December 6, 1991. 675 Mass. Reg. 45-46 (Dec. 6, 1991) (amending air pollution control regulations by adding Transit System Improvements). The new section regarding public transportation listed infrastructure upgrades and deadlines. *Id.*; 310 MASS. CODE REGS. 7.36 (1991).

89. 310 MASS. CODE REGS. 7.36(2) (1991) (listing projects and deadlines); *id.* 7.36(4) (providing option for substitute improvement projects). The projects incorporated into the state's environmental regulations

enumerated improvements included restoration of service along the Green Line's E branch to Arborway, modernization of the Blue Line stations, expansion of service along the South Boston waterfront, extension of the Green Line through Somerville to the Tufts University area, and a connection between the Red and Blue Lines between Bowdoin and Charles Stations in the West End.⁹⁰ Modernization of the Blue Line is near completion, as the MBTA expanded stations to handle six-car trains, tested the new trains in 2007, and began putting them in service in 2008.⁹¹ Service along the South Boston waterfront, including the desired link between the Red Line and Logan Airport, began in June 2005, when the MBTA opened the Silver Line Waterfront branch, a dedicated-lane rapid bus line.⁹² The other three upgrades to MBTA subway service required under the original agreement have yet to be completed.⁹³

included upgrades, expansions, and extensions of MBTA parking facilities, commuter rail, and subway service. *See id.* 7.36(2).

90. *Id.* 7.36(2)(d), (e), (g), (h). Additionally, the regulations required studies for projects that would improve transferability on the MBTA, such as a subway link between South Station and Logan Airport and the long-sought Urban Ring, a circumferential transit route connecting the spoke-and-wheel lines further out from downtown. *Id.* 7.36(6)(c), (d). In addition to the items in the regulations, the CLF claimed that the agreement required the MBTA to purchase new buses and replace Orange Line service to the Washington Street corridor, where it ran prior to the Southwest Corridor realignment. Flint, *Suit*, *supra* note 78 (discussing MBTA's actions in Roxbury after Orange Line realignment); Howe, *MBTA Lawsuit*, *supra* note 88 (listing projects CLF claimed MBTA required to complete). The Orange Line replacement and fleet upgrades were part of smaller agreements the state made in obtaining Big Dig clearances, rather than those in the settlement agreement encoded in the state environmental regulations. *See* Thomas C. Palmer, Jr., *Activists to Hold Rally Urging State to Keep Transit Pledges*, BOSTON GLOBE, Mar. 29, 1999, at B3 [hereinafter Palmer, Jr., *Activists*] (indicating state's transportation promises made in various environmental reports, regulations, and construction permits).

91. *See* Noah Bierman, *MBTA Bolsters Rush-Hour Train, Bus Service*, BOSTON GLOBE, Sept. 4, 2008, at 5 (noting fall 2008 phase-in for new cars); Noah Bierman, *MBTA Is Rolling Out: New Fleet on Blue Line*, BOSTON GLOBE, Dec. 25, 2007, at 1A (reporting testing of new six-car trains for use beginning in summer 2008); Daniel, *State Agrees to Design Link*, *supra* note 14 (discussing modernization of Blue Line); Peter J. Howe, *Blue Line Upgrades Just the Ticket, Riders Say*, BOSTON GLOBE, Feb. 21, 2008, at 1B (reporting four of expected ninety-four new trains enter Blue Line fleet); *see also* 310 MASS. CODE REGS. 7.36(2)(e) (1991) (setting original deadline for Blue Line modernization).

92. Editorial, *Silver Line Ambitions*, BOSTON GLOBE, May 31, 2005, at A12 (marking opening of line's airport link, completing Waterfront portion); *see* 310 MASS. CODE REGS. 7.36(2)(g) (1991) (establishing Dec. 31, 2001 deadline for South Boston Piers Electric Bus Service).

93. Daniel, *State Agrees to Design Link*, *supra* note 14 (updating status of original agreement projects). In 2006, the state eliminated restoration of Green Line service along the E branch from Heath St. to the Arborway from the requirements list. *Id.*; *see* 310 MASS. CODE REGS. 7.36 (2007) (listing current transportation project requirements). The MBTA suspended Arborway service in 1985 and never fulfilled its promise to replace the service. Madison Park, *The Unused Track Runs Through It*, BOSTON GLOBE, May 15, 2005, City Weekly, at 3. Some residents of Jamaica Plain continue to push for restoration, but others do not want trolley service to return to Centre Street. *Id.* At the other end of the Green Line, the state is planning the extension of service to Somerville and Medford, but in 2007, Governor Deval Patrick indicated a desire to secure federal funding for the construction, threatening to delay the project to 2016. Christine McConville, *Mayor Sees Chance in MBTA Delay*, BOSTON GLOBE, Sept. 23, 2007, at NorthWest 8 (reporting application for funding could result in new delay). *But see* Andrea Estes, *Patrick Seeks \$300 Million for Green Line*, BOSTON GLOBE, Oct. 13, 2007, at 3B (paraphrasing Patrick as saying 2014 completion possible in spite of funding

In 1998, the CLF provided the MBTA a sixty-day notice that it intended to file suit in federal court for failure to comply with the agreement's Clean Air Act requirements.⁹⁴ The suit was pre-empted, however, when Massachusetts Attorney General Scott Harshbarger sued the state's Executive Office of Transportation and Construction—the agency overseeing the MBTA infrastructure upgrades—and the Massachusetts Highway Department in Suffolk Superior Court for project failures.⁹⁵ Although the state resolved the Attorney General's suit by filing a consent order with the court, the failure to address the Arborway issue led to a separate action by the Arborway Committee.⁹⁶ In October 2005, the Massachusetts Department of Environmental Protection proposed an amendment to the Big Dig environmental mitigation regulations regarding the outstanding transit projects.⁹⁷ Supported by Governor Mitt Romney as an improvement in the air

application). In February 2009, state officials settled on a plan for the extension's route in which the Green Line would terminate at Route 16, a busy commuter road, drawing praise from environmentalists for the likely alleviation of traffic but drawing ire from nearby residents. See Megan Woolhouse, *State Backs Green Line Extension into Medford*, BOSTON GLOBE, Feb. 4, 2009, at 3 (reporting plan disclosed at public meetings). Patrick's administration developed a Web site specifically dedicated to providing the Somerville and Medford communities with information about the project. Green Line Extension, <http://www.greenlineextension.org/default.asp> (last visited Mar. 20, 2009). The state has plans to design the Red-Blue Lines link at an estimated cost of \$30 million, but has not committed to its construction. Daniel, *State Agrees to Design Link*, *supra* note 14 (noting link construction not guaranteed).

94. See Howe, *MBTA Lawsuit*, *supra* note 88 (reporting possibility of suit against MBTA for failing to meet project deadlines). The group alleged that the MBTA had either not met certain deadlines or were behind schedule to the point that they could not meet the deadlines. *Id.* The MBTA denied that it was violating the agreement or its regulations, claiming that the state Department of Environmental Protection, charged under the Clean Air Act with enforcement, had granted extensions. *Id.*

95. Editorial, *Changing Direction on the T*, BOSTON GLOBE, Oct. 3, 1998, at A16 (discussing pre-emptive effect of Attorney General's suit); Thomas C. Palmer, Jr., *AG Sues 2 State Transit Agencies*, BOSTON GLOBE, Sept. 24, 1998, at B1 [hereinafter Palmer, Jr., *AG Sues*] (reporting filing of suit). Harshbarger's action not only relocated the litigation to state court, but it also kept the Arborway restoration and Red-Blue Line link outside the scope of the litigation, unlike the federal suit CLF threatened to bring. See Palmer, Jr., *AG Sues*, *supra*.

96. See Laura Brown, *Deal Struck to End Flap over T Fixes Tied to Big Dig*, BOSTON HERALD, Sept. 2, 2000, at 10 (indicating consent order effectively terminated suit against state); Raphael Lewis, *2 Agencies OK \$2B In Transit Projects*, BOSTON GLOBE, Sept. 2, 2000, at B1 [hereinafter Lewis, *2 Agencies OK \$2B*] (describing projects included in new agreement). In 2007, the Arborway Committee once again took up the fight over restoration of Green Line service that had been suspended in 1985 when it sued the Commonwealth for removing the restoration from the list of transit requirements. Press Release, Arborway Comm., Arborway Committee Sues Commonwealth of Massachusetts to Restore E-branch of the Green Line to Forest Hills (Feb. 13, 2007), available at <http://www.arborway.org/>. See generally, Complaint, Arborway Comm. v. Executive Office of Transp. and Constr., No. 07-0675E (Mass. Super. Ct. Feb. 13, 2007), available at http://www.arborway.org/Stamped_Complaint.pdf. On April 5, 2007 defendant CLF filed its answer, followed by the state on July 10, 2007, with no further information available as of this writing. See generally Answer of the Conservation Law Foundation, Arborway Comm. v. Executive Office of Transp. and Constr., No. 07-0675E (Mass. Super. Ct. Apr. 5, 2007), available at <http://www.arborway.org/arbcomm20070405CLFanswerswasfiled.pdf>; State Defendants' Answer, Arborway Comm. v. Executive Office of Transp. and Constr., No. 07-0675E (Mass. Super. Ct. July 10, 2007), available at <http://www.arborway.org/arbcomm20070710statedefendantsanswerswasfiled.pdf>.

97. See BACKGROUND DOCUMENT, *supra* note 88, at 1 (summarizing proposed amendments to 310 MASS. CODE REGS. 7.36); see also Appendix C, <http://www.mass.gov/dep/air/laws/catregs.pdf> (last visited Mar. 20,

quality benefits that the regulations intended, the proposed modification led the CLF to file suit against Romney, other state defendants, the MBTA, and the Massachusetts Turnpike Authority.⁹⁸ The federal district court denied the defendants' motion to dismiss on all but two counts.⁹⁹ After that decision, the state settled with CLF and moved forward with the amendments, including elimination of the Arborway restoration requirement.¹⁰⁰

III. ANALYSIS

A. Statutory History

Although the Massachusetts legislature intended to subject the MBTA to liability, it did not originally intend to treat the MBTA preferentially.¹⁰¹ The purpose of the liability provision in Chapter 161A was likely to allow citizens

2009) (providing actual line-by-line amendments as proposed). The proposal sought to replace two of the old requirements, the Arborway restoration and the Red-Blue Line link, with added stops to the Fairmount commuter rail line and increased parking spaces at commuter rail stations, while revising the Green Line extension beyond Lechmere. See BACKGROUND DOCUMENT, *supra* note 88, at 2; see also Mac Daniel, *Somerville Leaders Protest Transit Plans*, BOSTON GLOBE, Dec. 22, 2005, at B2 [hereinafter Daniel, *Somerville*] (reporting reaction to announcement of proposed modification).

98. *Conservation Law Found. v. Romney*, 421 F. Supp. 2d 344, 347 (D. Mass. 2006) (summarizing basis of plaintiff's suit); Editorial, *Romney the "New Urbanist"*, PROV. J. BULL., Dec. 9, 2005, at B4 (commenting on Romney's support for modifications to transit upgrade regulations).

99. *Conservation Law Found.*, 421 F. Supp. 2d at 358 (concluding CLF stated claim for relief on all but two counts). CLF brought its claims under 42 U.S.C. § 7604, which allows for limited citizen suits for violations of specific standards under the Clean Air Act or the state's State Implementation Plan. See *id.* at 347-48; see also 42 U.S.C. § 7604 (2006) (granting federal courts citizen-suit jurisdiction). The defendants argued that statutory federal jurisdiction does not extend to the deadlines of many of the transportation upgrades in question, and regarding those to which jurisdiction does apply, plaintiffs may not bring citizen suits anticipatorily. *Conservation Law Found.*, 421 F. Supp. 2d at 349, 354 (stating defendants' grounds for dismissal). The judge rejected these arguments and held that CLF had sufficiently claimed a possible violation covered by the citizen-suit jurisdiction on all counts that the defendants argued were outside jurisdiction or not yet actionable. See *id.* at 353-54, 357 (denying motion on counts in question). The defendants also sought dismissal of some of CLF's allegations on the basis that no enforceable deadline was in place. *Id.* at 357. The court reluctantly granted dismissal of two of CLF's counts for this reason, as the requirements for promotion of traffic signalization benefiting public-transportation vehicles over private vehicles and development of rail service between Boston and Providence's T.F. Green Airport had no specific requirements or deadlines. See *id.* at 357-58 & n.15 (describing "troubling" implications of ruling). On the other hand, the court denied the defendants' motion in regard to securing federal funding for Silver Line's Phase III because the regulation contained a sufficiently specific deadline on which to base a suit. See *id.* at 358.

100. 310 MASS. CODE REGS. 7.36 (2007) (reflecting amended version of transportation upgrade regulations); see Patrick Anderson, *Greenbush Trains Must Be Running by End of 2007*, PATRIOT LEDGER, Nov. 30, 2006, at 12 (reporting settlement of CLF's suit against state); Daniel, *State Agrees to Design Link*, *supra* note 14 (describing settlement's effects on changes to state's transportation upgrade requirement regulations). Although the state originally sought to remove the Red-Blue Line link in the amendment, it agreed to design, but not necessarily build, such a connection under the settlement. See Daniel, *State Agrees to Design Link*, *supra* note 14. As noted, the Arborway issue remains at the center of other litigation. See *supra* note 96 and accompanying text (discussing Arborway Committee litigation).

101. *Jomides v. Mass. Bay Transp. Auth.*, 488 N.E.2d 800, 803 (Mass. App. Ct. 1986) (refusing to affix preferential intent to legislature's choice of two-year liability period), *aff'd*, 502 N.E.2d 137 (Mass. 1986).

of Massachusetts to retain the right to sue the transportation service provider, even though the provider was now a government entity.¹⁰² The language of the provision hints at this purpose, stating that the MBTA can be sued “as though it were a street railway company,” the predecessors to the MBTA.¹⁰³ The 1964 legislature’s establishment of the limitations period at two years gave the citizenry the ability to sue the MBTA in the same capacity as other transportation providers.¹⁰⁴

The 1973 session of the legislature created the MBTA’s exception by extending the general limitations period by a year.¹⁰⁵ This was possibly sheer oversight, rather than purposeful intent, because the act creating the exception does not mention Chapter 161A or the MBTA.¹⁰⁶ Had the 1973 legislature intended to give the MBTA a statute of limitations one year shorter than that of private transportation providers, it could have stated that purpose affirmatively.¹⁰⁷ Under the statutory interpretation canon of “the dog that did not bark,” a questionable intention should not be ascribed to a legislature that did not express that intention in the statute or its legislative materials.¹⁰⁸ In *Jomides v. Massachusetts Bay Transportation Authority*,¹⁰⁹ the court recognized this logic even though the decision preceded *Chisom v. Roemer*¹¹⁰ by five years.¹¹¹ Although the MBTA may benefit from the discrepancy without the legislature’s affirmative statement of preferential treatment, one cannot impute upon the 1973 legislature’s action an intention to benefit the

102. See *Lavecchia v. Mass. Bay Transp. Auth.*, 804 N.E.2d 932, 936 (Mass. 2004) (speculating reason legislature made MBTA liable for torts).

103. MASS. GEN. LAWS ch. 161A, § 38 (2006); see *supra* notes 27-29 and accompanying text (providing history of Boston’s public transportation prior to MBTA).

104. See *supra* notes 9, 44 (indicating same period for both statutes of limitations in 1964).

105. 1973 Mass. Acts 761, 761-62 (enacting extension of statute of limitations to three years); see *supra* notes 50-51 and accompanying text (describing effect of 1973 amendment).

106. 1973 Mass. Acts 761, 761-62 (changing some limitations periods in Chapter 260).

107. See 1973 Mass. Acts 761, 761-62 (providing language of bill addressing statutes of limitations); see *supra* note 50 and accompanying text (discussing legislature’s opportunity to address MBTA limitations period issue). In *Lavecchia*, the Supreme Judicial Court noted that “the Legislature has *retained* the two-year limitations provision in the MBTA statute despite numerous extensions of other statutes of limitations.” 804 N.E.2d at 936 (emphasis added). Aside from *Hearn*, this is the closest that court has come to recognizing an intent on the legislature’s part to treat the MBTA preferentially. See *supra* notes 52-57 and accompanying text (discussing *Hearn*). Later in *Lavecchia*, however, the court steps back from such an assertion, stating that “the Legislature has not reconsidered” the issue in the aftermath of *Hearn* and *Thomas*. *Lavecchia*, 804 N.E.2d at 937.

108. *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (rejecting proposed construction because Congress did not explicitly express intention of such construction); see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term – Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 101 (1994) (summarizing statutory interpretation canons of Rehnquist court through 1993).

109. 488 N.E.2d 800 (Mass. App. Ct. 1986), *aff’d*, 502 N.E.2d 137 (Mass. 1986).

110. 501 U.S. 380 (1991).

111. *Jomides*, 488 N.E.2d at 803 (refusing to attribute legislative intent to adopt shortened statute of limitations for MBTA).

MBTA.¹¹²

The possibility that Bulger, the bill's sponsor, sought to make the state's statutes of limitation for tort and contract actions the same provides a plausible explanation for the 1973 amendment.¹¹³ The statute of limitations for contract and tort actions had been the same in Massachusetts prior to 1948, when, for the sake of uniformity, the legislature shortened the limitations period to two years for both tort actions and contract actions for personal injury.¹¹⁴ Bulger's bill would have maintained uniformity for personal-injury actions and made the limitations period for tort and contract actions the same once again, as the inconsistency raised a problem for judges in determining whether to apply a two- or six-year limitations period to ambiguous actions.¹¹⁵ Like the enacted legislation, Bulger's bill failed to consider that Chapter 161A provided the MBTA a separate liability provision with a unique statute of limitations.¹¹⁶ In this sense, Bulger's bill was no different than the final version that passed, as it also would have created a discrepancy.¹¹⁷ If the legislature had truly intended to treat the MBTA preferentially, a four-year benefit in the time period for liability would be more logical than a one-year benefit.¹¹⁸

The legislature, in amending the bill to a three-year period rather than a six-year period, apparently shared the sentiment of their 1948 counterparts that entities liable in tort actions deserve more protection than those liable in contract actions.¹¹⁹ This decision countervailed Bulger's likely purpose of making more uniform limitations periods, but did not demonstrate intent to treat the MBTA preferentially.¹²⁰ It is difficult, if not impossible, to attribute an intention to the entire legislature in the absence of explicit expression of such intention because each legislator may have had a different motive for

112. See *id.* at 803 (stating court not allowed to affix preferential intent to discrepancy); see also *O'Brien v. Mass. Bay Transp. Auth.*, 541 N.E.2d 334, 336 (Mass. 1989) (applying *Jomides* reasoning and quoting *Jomides*).

113. S. 163-584, 1st Sess., at 1 (Mass. 1973) (proposing change to Chapter 260 to make tort limitations period same as contract limitations period).

114. 1948 Mass. Acts 249, 249; see *supra* note 47 and accompanying text (discussing changes to statutes of limitations made in 1948).

115. See S. 163-584, 1st Sess., at 1 (Mass. 1973); *Kagan v. Levenson*, 134 N.E.2d 415, 417 (Mass. 1956) (providing example of problem facing judges regarding ambiguity in action's nature); see also *supra* note 47 (describing legislation's effect).

116. S. 163-584, 1st Sess., at 1 (Mass. 1973) (focusing only on Chapter 260 limitations periods).

117. Compare 1973 Mass. Acts 761, 761-62 (enacting three-year limitations period), with S. 163-584, 1st Sess., at 1 (Mass. 1973) (proposing six-year limitations period).

118. Compare 1973 Mass. Acts 761, 761-62, and S. 163-584, 1st Sess., at 1 (Mass. 1973) (providing actual and proposed extensions of general limitations period), with MASS. GEN. LAWS ch. 161A, § 38 (2006) (establishing two-year limitations period for MBTA).

119. Compare 1973 Mass. Acts 761, 761-62 (maintaining shorter limitations period for tort-based actions), with 1948 Mass. Acts 249, 249 (creating shorter limitations period for tort-based actions).

120. See MASS. GEN. LAWS ch. 260, § 2 (2006) (setting six-year limitations period for contract issues); S. 163-584, 1st Sess., at 1 (Mass. 1973) (proposing six-year tort limitations period); Mass. S. Jour., at 2170-71 (1973); see also *supra* note 48 and accompanying text (describing 1973 amendment process).

supporting a bill.¹²¹ Therefore, although it is possible that some members of the 1973 legislature intended to give the MBTA a preferential limitations period by amending Chapter 260, the record does not reflect that intent.¹²²

The legislature may have been aware of the effect of the discrepancy when it overhauled Chapter 161A in 1999, after Massachusetts courts addressed the issue in *Hearn v. Massachusetts Bay Transportation Authority*¹²³ and *Jomides*, but keeping the MBTA limitations period at two years may not have been an intentional grant of preferential treatment.¹²⁴ The legislature's 1999 strike-and-replace of Chapter 161A retained the limitations provision of section 21, but moved it to the new Chapter 161A's section 38.¹²⁵ Given the strike-and-replace version of Chapter 161A's placement in a budget bill and the fact that no substantive changes were made to the language of the liability provision, it is hard to imagine that the legislature intended to provide the MBTA a benefit by not modifying the limitations period.¹²⁶

B. The Hearn Court's Error

Although the limitations period discrepancy does not pose an equal protection violation, it does grant the MBTA unjustified preferential treatment.¹²⁷ The legislature has the power to give the MBTA a beneficial limitations period, even through oversight rendering the benefit baseless; however, it also has the power to revoke the benefit.¹²⁸ None of the three legislatures in question—1964, 1973, and 1999—demonstrated a clear intent to

121. See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) (labeling collective legislative intent fiction).

122. See 1973 Mass. Acts 761, 761-62; S. 163-584, 1st Sess., at 1 (Mass. 1973); Mass. H. Jour., at 173, 1972, 2010, 2067, 2707, 2759 (1973); Mass. S. Jour., at 82, 1633, 1648, 2008, 2033, 2068, 2139, 2170-71, 2281, 3542 (1973). Unfortunately, the record also does not reflect the reason the legislators chose three years as the new limitations period. See 1973 Mass. Acts 761, 761-62; S. 163-584, 1st Sess., at 1 (Mass. 1973); Mass. H. Jour., at 173, 1972, 2010, 2067, 2707, 2759 (1973); Mass. S. Jour., at 82, 1633, 1648, 2008, 2033, 2068, 2139, 2170-71, 2281, 3542 (1973).

123. 450 N.E.2d 602 (Mass. 1983).

124. See *Lavecchia v. Mass. Bay. Transp. Auth.*, 804 N.E.2d 932, 937 (Mass. 2004) (noting legislature's ability to address issue after *Hearn* and *Thomas* decisions); see also *supra* note 45 and accompanying text (describing legislation's budgetary purpose and indicating original liability provision replicated in 1999 version).

125. See *Lavecchia*, 804 N.E.2d at 934 n.2 (discussing 1999 amendment's effect on MBTA liability provision); see also *supra* note 45 and accompanying text (detailing 1999 amendment). Compare 1999 Mass. Acts 337, 899 (providing language for new version of Chapter 161A's section 38), with 1964 Mass. Acts 429, 451-52 (providing language of original Chapter 161A section 21).

126. See *supra* note 45 and accompanying text (describing circumstances surrounding 1999 legislation reforming Chapter 161A).

127. *Hearn*, 450 N.E.2d at 604 (rejecting alleged equal protection violation in MBTA limitations period discrepancy); see *supra* notes 54-56 and accompanying text (discussing Supreme Judicial Court's analysis of equal protection claim).

128. See *Hearn*, 450 N.E.2d at 604 (approving discrepancy given legislature's possible rational basis); *supra* note 7 and accompanying text (discussing attempts to amend MBTA's limitations period).

grant the MBTA a more favorable statute of limitations than that which generally exists.¹²⁹ This suggests that, while there may be a rational basis for the MBTA's shorter statute of limitations, the *Hearn* court erred in ascribing that rational basis on the grounds of the legislative intent.¹³⁰ The court's discussion of Hearn's equal protection argument suggests the court felt the legislature intentionally excused the MBTA from the three-year statute of limitations, even though no three-year limitations period existed when the legislature enacted Chapter 161A.¹³¹

The 1964 legislature could have rationally chosen to provide the MBTA a shorter limitations period along the lines of the *Hearn* reasoning, but the 1973 legislature's actions do not support the Supreme Judicial Court's decision to ascribe intent to the legislature.¹³² The 1964 legislature had a rational basis for creating a two-year limitations period for the MBTA—it did not want the new authority to be immune from liability, so it applied the existing limitations period in Chapter 260 to Chapter 161A.¹³³ Though the choice of three years is enigmatic, the 1973 legislature arguably had a rational basis for extending the statute of limitations in Chapter 260 section 2A.¹³⁴ Although “the [l]egislature *could* have concluded that there [was] a rational basis for treating the MBTA differently from others because of its special public obligations,” the record of the 1973 legislature is void of any such conclusion.¹³⁵

The language of the original bill and the enacted legislation indicate that the 1973 legislature did not seek to address the MBTA's statute of limitations.¹³⁶ The bill, both in its proposed and enacted forms, addressed all personal-injury actions.¹³⁷ It is not rational, therefore, to conclude that the legislature intended

129. See *supra* note 44 and accompanying text (discussing 1964 legislative action); *supra* note 45 and accompanying text (summarizing 1999 legislative action); *supra* notes 46-51 (detailing 1973 legislative action).

130. See *Hearn v. Mass. Bay Transp. Auth.*, 450 N.E.2d 602, 604 (Mass. 1983) (indicating legislature had rational basis for providing MBTA shorter limitations period); cf. *Jomides v. Mass. Bay Transp. Auth.*, 488 N.E.2d 800, 803 (Mass. App. Ct. 1986) (refusing to attribute preferential intention to legislature), *aff'd*, 502 N.E.2d 137 (Mass. 1986); see also *supra* note 108 and accompanying text (describing “dog that did not bark” canon of statutory interpretation).

131. *Supra* note 44 and accompanying text (comparing limitations period lengths); see *Hearn*, 450 N.E.2d at 604 (using language suggesting preferential treatment for MBTA); cf. *Jomides*, 488 N.E.2d at 803 (refusing imputation of special limitations period for MBTA given history of Chapter 260).

132. See *Hearn*, 450 N.E.2d at 604; *supra* notes 46-50 and accompanying text (discussing 1973 amendment of Chapter 260).

133. See *Lavecchia v. Mass. Bay Transp. Auth.*, 804 N.E.2d 932, 936 (Mass. 2004) (stating possible reason legislature made MBTA liable); *supra* note 44 and accompanying text (comparing limitations periods' histories).

134. See *supra* notes 46-50 and accompanying text (describing 1973 amendment history and possible rationale).

135. *Hearn*, 450 N.E.2d at 604; see 1973 Mass. Acts 761, 761-62; S. 163-584, 1st Sess., at 1 (Mass. 1973); Mass. H. Jour., at 173, 1972, 2010, 2067, 2707, 2759 (1973); Mass. S. Jour., at 82, 1633, 1648, 2008, 2033, 2068, 2139, 2170-71, 2281, 3542 (1973).

136. 1973 Mass. Acts 761, 761-62 (providing passed legislation); S. 163-584, 1st Sess., at 1 (Mass. 1973) (providing text of proposed bill).

137. S. 163-584, 1st Sess., at 1 (Mass. 1973); 1973 Mass. Acts 761, 761-62 (recording enactment of S. 584

to make the MBTA limitations period shorter than the general one—a conclusion on which the *Hearn* court based its holding.¹³⁸ The *Hearn* court, in its discussion of the implied repeal argument, recognized that the discrepancy occurred years after the legislature created the MBTA.¹³⁹ Even with this knowledge, the court missed the mark when it wrote that “the Legislature could have provided the same time constraints for bringing action against the MBTA as it had provided for commencing actions against others” because the 1964 legislature did just that.¹⁴⁰ Attributing to the legislature preferential intention in favor of the MBTA is improper—a point the appellate court made in *Jomides*, the Supreme Judicial Court later recognized in *O'Brien v. Massachusetts Bay Transportation Authority*,¹⁴¹ and the “dog that did not bark” canon of statutory interpretation illustrates.¹⁴²

C. Policy Reasons

Beyond the statutory history and the *Hearn* court’s misunderstanding of that history, the MBTA does not deserve special liability protection from the Commonwealth because of its failure to carry out its Big Dig mitigation obligations.¹⁴³ The Red-Blue Line link would connect the only two MBTA lines that currently fail to intersect, though this is no longer as necessary as it was prior to Silver Line service between the Red Line and Logan Airport.¹⁴⁴ Though the link remains part of the mitigation package, the MBTA has only committed to a design of the project.¹⁴⁵ Spending \$30 million to design a tunnel that will never be built seems more wasteful than spending \$264 million to build a connection that would increase passenger flow on the MBTA and relieve pressure from the Green Line between Park Street and Government Center, two of the system’s central stations.¹⁴⁶ Further, the MBTA’s failure to resolve the Arborway issue continues to plague the residents of Jamaica Plain, many of whom want a final decision, regardless of the outcome, because of the

in amended form).

138. See *Hearn v. Mass. Bay Transp. Auth.*, 450 N.E.2d 602, 604 (Mass. 1983) (rejecting equal protection claim and giving preferential treatment to MBTA rational given its responsibility as public transportation entity); *supra* note 56 and accompanying text (discussing *Hearn* court’s equal protection analysis); *supra* note 108 and accompanying text (noting Supreme Court’s use of statutory interpretation in *Chisom*).

139. *Hearn*, 450 N.E.2d at 604 (discussing 1973 legislature’s amendment of Chapter 260).

140. *Id.* (commenting on legislature’s creation of MBTA liability provision); see *supra* notes 43-44 and accompanying text (noting legislature expressly made MBTA liable to same extent as private entities).

141. 541 N.E.2d 334 (Mass. 1989).

142. *Id.* at 336; *Jomides v. Mass. Bay Transp. Auth.*, 488 N.E.2d 800, 803 (Mass. App. Ct. 1986) (recognizing discrepancy but refusing to attribute intention to its creation), *aff’d*, 502 N.E.2d 137 (Mass. 1986); see *supra* note 108 (describing use of statutory interpretation in *Chisom*).

143. See *supra* Part II.D (summarizing MBTA’s obligations and performance of such obligations).

144. Daniel, *State Agrees to Design Link*, *supra* note 14; see MBTA, http://www.mbta.com/schedules_and_maps/subway/ (last visited Mar. 20, 2009) (showing alignment of Blue and Red Lines).

145. Daniel, *State Agrees to Design Link*, *supra* note 14.

146. *Id.*

problems the temporary replacement buses and unused tracks present.¹⁴⁷

The MBTA failed or will fail to meet the original deadlines on three of the original five mitigation projects, which results in delays and extensions of those deadlines to maintain technical compliance.¹⁴⁸ Blue Line modernization was originally slated for completion by the end of 1998 and comprised of updated stations capable of handling six-car trains that would replace the current fleet of four-car trains.¹⁴⁹ A decade later, all stations were finally ready to handle the new trains and the MBTA began running them; the citizens of East Boston, Winthrop, and Revere, as well as commuters from the North Shore, dealt with crowding and construction for an additional ten years.¹⁵⁰ The MBTA did a better job on the South Boston Piers bus system, now known as Silver Line Waterfront, but still began service to the Seaport District approximately three years after the 2001 target.¹⁵¹ Although the original 2011 deadline for completion of the Green Line Somerville extension is a few years away, construction will not likely begin until 2012 and is highly contingent on the state securing federal funding.¹⁵² The delayed progress and funding issues mean trolleys will not begin running until 2014 at the earliest.¹⁵³

Adding to these failures is the MBTA's treatment of the citizens of Roxbury in the last two decades.¹⁵⁴ From 1987 to 1998, people living along the old Orange Line route desiring to get downtown had to suffer on diesel buses transporting them to the relocated line along the Southwest Corridor or fighting traffic along Washington Street.¹⁵⁵ For the last ten years and into the conceivable future, Roxbury residents have the Silver Line, which, like its predecessor, battles traffic along Washington Street and will not connect to the remainder of the MBTA rapid transit infrastructure until the Phase III link issue is solved.¹⁵⁶ This treatment of the public does not warrant extra protection from suits brought by that same public when the MBTA causes personal injury, property damage, or in the worst case, death.¹⁵⁷

147. Park, *supra* note 93; *see supra* note 96 (noting continuation of Arborway battle after removal from obligations list).

148. 310 MASS. CODE REGS. 7.36(2) (1991) (providing original deadlines); *see supra* note 94 and accompanying text (noting MBTA's method for avoiding liability for missed deadlines).

149. 310 MASS. CODE REGS. 7.36(2)(e) (1991).

150. *Supra* note 91 and accompanying text (discussing Blue Line modernization).

151. 310 MASS. CODE REGS. 7.36(2)(g) (1991); *supra* note 92 and accompanying text (noting date Silver Line commenced service along Waterfront branch).

152. *See* McConville, *supra* note 93 (reporting problems causing extension delays); Woolhouse, *supra* note 93 (discussing Green Line extension timeline). *See generally* Green Line Extension, <http://www.greenlineextension.org/default.asp> (last visited Mar. 20, 2009) (providing background, status, and frequently asked questions).

153. *See* Estes, *supra* note 93 (noting likely completion date).

154. *See supra* Part II.C (discussing relocation of Orange Line out of heart of Roxbury).

155. *Supra* note 71 and accompanying text (reviewing Orange Line replacement services in Roxbury).

156. *See supra* notes 74-79 and accompanying text (stating problems associated with Silver Line's Washington Street branch).

157. *See* MASS. GEN. LAWS ch. 161A, § 38 (2006) (requiring such suits be brought within two years).

IV. CONCLUSION

The legislature created the MBTA in 1964 in response to Governor Peabody's call for a new transportation authority that would serve all the people of Massachusetts and, in so doing, resolve the transportation crisis that developed in the decades after World War II. The legislature intended the MBTA to benefit the citizens of Massachusetts, so it made the authority liable to those citizens if it caused them injury. The purpose was to provide the citizens a forum for redress should the MBTA cause a passenger or bystander injury. The purpose was not to make it more difficult to sue the MBTA than private entities.

As the legislature had the power to make the MBTA liable, it retains the power to address issues of the authority's liability. Representative O'Flaherty, like Senators Creedon, Jr. and Havern before him, has recognized the problem the current statute of limitations discrepancy presents. H.R. 3284 would correct this discrepancy by amending the liability provision to extend the MBTA's statute of limitations to three years. The legislative history of the 1973 amendments to Chapter 260 fails to demonstrate an intention to provide the MBTA the beneficial treatment it receives today with its one-year shorter limitations period. Therefore, the current Massachusetts legislature has a responsibility to rectify the situation for the benefit of the citizens, such as the passengers in the Canton Junction collision, who may have causes of action against the MBTA.

This responsibility requires not just consideration of H.R. 3284, but passage of the bill to make the MBTA's limitations period the same as the general limitations period, like it was in 1964. Should the Joint Committee on Transportation, and the legislature as a whole, continue to shirk this responsibility, it may be necessary for legislators like Representative O'Flaherty to take steps beyond proposing an independent bill to amend the MBTA's limitation provision. The legislative tactic of attaching a bill to one more likely to be passed may be necessary. Alternatively, a legislator may need to insert the language of H.R. 3284 into omnibus legislation in connection to the budget. After all, the legislature did use the 1999 omnibus budget legislation to strike-and-replace Chapter 161A; a legislator could utilize this tool to advance the amendment of section 38. Regardless of the method or avenue, Representative O'Flaherty's colleagues on Beacon Hill should make this long overdue change.

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